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IN THE

Supreme Court of the United States

October Term, [redacted] 1970
No. ... [redacted] 150

CALIFORNIA STATE BOARD OF EQUALIZATION,
Petitioner,

vs.

RICHARD A. CARLSON,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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vs.

RICHARD A. CARLSON,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

The petitioner California State Board of Equalization (sometimes hereinafter called "the board") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 9, 1970.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto. The decision of the District Court published at 292 F. Supp. 778, is attached hereto as Appendix B.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 9, 1970. This petition for certiorari was filed within 90 days of that date.

This court's jurisdiction is invoked under 28 U.S.C., section 1254(1).

Question Presented

Does section 17a(1) of the Bankruptcy Act (11 U.S.C., §35(a)) discharge a pre-bankruptcy tax lien over three years old (and thus prevent its attaching to assets acquired after bankruptcy) notwithstanding the provision therein, "That a discharge in bankruptcy shall not release or affect any tax lien"?

Statutory Provisions Involved

Bankruptcy Act § 17 [United States Code, Title 11 (1965-68 Supp., p. 608), § 35]:

(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable debts, whether allowable in full or in part, except such as (1) are taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof within three years preceding bankruptcy: *Provided, however,* That a discharge in bankruptcy shall not release a bankrupt from any taxes (a) which were not assessed in any case in which the bankrupt failed to make a return required by law, (b) which were assessed within one year preceding bankruptcy in any case in which the bankrupt failed to make a return required by law, (c) which were not reported on a return made by the bankrupt and which were not assessed prior to bankruptcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt, (d) with respect to which the bankrupt made a false or fraudulent return, or willfully attempted in any manner to

evade or defeat, or (e) which the bankrupt has collected or withheld from others as required by the laws of the United States or any State or political subdivision thereof, but has not paid over; but a discharge shall not be a bar to any remedies available under applicable law to the United States or to any State or any subdivision thereof, against the exemption of the bankrupt allowed by law and duly set apart to him under this title: *And provided further*, That a discharge in bankruptcy shall not release or affect any tax lien; (2) liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; (5) are for wages which have been earned within three months before the date of commencement of the proceedings in bankruptcy due to workmen, servants, clerks, or traveling or city salesmen, on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt;

or (6) are due for moneys of an employee received or retained by this employer to secure the faithful performance by such employee of the terms of a contract of employment. (As amended July 5, 1966, Pub. L. 89-496, § 2, 80 Stat. 270.) (Underscoring added.)

Statement of the Case

On September 22, 1967, Richard A. Carlson, hereinafter called "Carlson", filed a voluntary petition in bankruptcy. Thereafter he obtained a discharge.

Carlson became indebted to the board for liability under the California Sales and Use Tax Law more than three years before he filed his bankruptcy petition. The board duly recorded tax liens. Said tax liens were valid and in full force and effect prior to September 22, 1967.

Although Carlson held assets when he filed bankruptcy, such assets were insufficient to pay the tax liens. But for the effect of section 17 of the Bankruptcy Act, the tax liens would now remain in full force and effect and attach to all assets acquired since bankruptcy and now owned by Carlson.

On October 3, 1967, Carlson filed in his bankruptcy an application to permanently enjoin the board from enforcing its liens against assets acquired by Carlson after bankruptcy. The referee granted the injunction. The board petitioned for review of the referee's order. The order was affirmed by the District Court (Appendix B). The board timely filed its notice of appeal to the Court of Appeals for the Ninth Circuit. The decision of the Ninth Circuit (Appendix A) affirmed the decision of the District Court permanently enjoining enforcement by the board of its tax liens.

REASONS FOR GRANTING THE WRIT

The dischargeability of tax liens is of substantial nationwide importance to all levels of government.

Although the Court of Appeals recognized the substantiality of the arguments involved, it refused to discuss them and issued a summary ruling the effect of which will be in many instances to *totally* prevent *any* opportunity to collect state and local taxes.

The summary ruling of the Court of Appeals releases and affects tax liens in direct violation of the clear statutory language and express purpose of the proviso that "a discharge in bankruptcy shall not release or affect any tax lien" and in conflict with the long established rules of statutory construction enunciated by this court.

1. Dischargeability of Tax Liens Is a Substantial Federal Question Important to All Levels of Government Which Should Be Settled by the Supreme Court

Government at all levels (local, state, and national) depends on taxes as the primary source of revenue needed to pay for and furnish essential governmental services. Thus, the enforceability and collectibility of taxes is of fundamental nationwide importance. The 1966 amendments to the Bankruptcy Act created after at least eight years of debate in Congress limited dischargeability of taxes.

Any discharge of tax liability interferes with the power of government to finance its necessary operations. Thus, the extent of such discharge is a question of federal law of importance sufficient to merit the atten-

tion of the Supreme Court. This is especially true where, as here, the Court of Appeals totally ignored the statutory language, clear expressions of legislative intent, and the public policy of protecting revenues of state and local government in ruling (summarily and without even discussing the arguments or the court's reasoning) that tax liens are discharged notwithstanding Congress' mandate that "a discharge in bankruptcy shall not release or affect any tax lien."

2. Discharge of Tax Liens When Coupled With the Secret Federal Tax Lien and Priority Completely Prevents Collection of State and Local Taxes. Such a Result Raises Substantial Federal Questions Which Should Be Considered by the Supreme Court

The legislative history of the 1966 Bankruptcy Act shows that Congress was concerned with the huge burden of *federal* taxes and the *secret federal* tax lien. e.g. 112 *Cong. Rec.* 13172 (daily ed. June 21, 1966). There was discussion of and recognition of the need to afford government a reasonable opportunity to collect taxes. Yet the result of the ruling by the Court of Appeals will in many cases be to *totally deprive* state and local government of *all* opportunity to collect undisputed tax liability.

It is a well-known fact that state and local tax collectors frequently are prevented from collecting taxes when a delinquency comes to their attention because of taxes owed to the United States. Not only has Congress given the federal government the right to first payment where a debtor is insolvent, §3466 of the Revised Statutes, 31 U.S.C. §191, but a secret federal tax lien on all the taxpayer's property and rights to property

arises upon *assessment* of federal taxes under §6321 of the Internal Revenue Code of 1954, 68A Stats. 779.

This federal assessment lien, even though not recorded, is entitled to full priority over state taxes. *United States v. Gilbert Associates,* 345 U.S. 361 (1953). There is nothing that a state or local tax collector can do to obtain priority over a prior federal assessment.

The federal taxes, and thus federal tax delinquencies, are increasingly large—both in rates and amounts. Thus, when the California State Board of Equalization (and undoubtedly most other state and local tax administrators) records a lien or attempts collection of delinquencies, it normally finds that its tax delinquents have already been subjected to a substantial federal tax assessment. Since the federal tax assessment constitutes a lien on *all* the assets of the tax delinquent, there is no source from which collection of the state tax can be made. *All the state tax collector can do is record his lien and wait* until the federal lien is satisfied, compromised or lapses after six years. See Int. Rev. Code of 1954, §§6322, 6502.

However, the Court of Appeals has apparently ruled here that *three* years after the tax liability arose a delinquent taxpayer may completely wipe out the tax lien even though the state has had *no* opportunity whatsoever to attempt collection and has done everything possible to protect its right to collect its tax revenues. Had Congress intended to place state and local tax collectors in such an impossible position there certainly would have been some reference thereto during the long history of the amendments. Had Congress intended to do so it might be an unconstitutional interference

with the powers of the states to raise revenues through taxation. See U.S. Const. Amend. X.

Whether Congress intended to, did or could enact a discharge statute which when applied in conjunction with the federal priority and secret lien statutes completely prevents collection of proper state and local taxes are substantial federal questions which should be considered by the Supreme Court.

3. The Ruling of the Court of Appeals That Tax Liens Are Discharged in the Face of a Statutory Provision "That a Discharge in Bankruptcy Shall Not Release or Affect Any Tax Lien" and Clear Legislative History Showing Congressional Intent That Tax Liens Not Be Discharged Conflicts With the Longstanding Rulings of the Supreme Court Which Require That Statutes Be Construed in Accordance With Their Wording and Legislative Intent

The fundamental rule of statutory construction enunciated by this court is that a statute must be construed consistently with the intent of the Legislature. See *U.S. v. Public Utilities Comm'n,* 345 U.S. 295 (1953). The inquiry must start with examination of the language used in the statutes being construed. See *United States v. American Trucking Assns.,* 310 U.S. 534, 543 (1940). However, this language must not be dissected from the legislation of which it is a part, but must be construed in harmony therewith. *Federal Power Commission v. Panhandle Eastern Pipe Line Co., et al.,* 337 U.S. 498 (1949). Beyond the specific language and context of the statute at issue, the best source of determining legislative intent is the legislative history of the statute. *Commissioner v. Bilder,* 369 U.S. 499 (1962).

The board respectfully submits that the lower court clearly violated these fundamental holdings of this court and basic requirements of statutory construction in ruling that section 17 of the Bankruptcy Act, as amended in 1966, discharges and precludes enforcement of tax liens.

The statute creating the tax liens of the board here in issue provides that, "[f]rom the time of the filing for record, the amount required to be paid together with interest and penalty constitutes a lien upon all property in the county owned by the person or afterward and before the lien expires acquired by him. . . ." (Calif. Rev. & Tax. Code, §6757.) The Court of Appeals permanently enjoined any enforcement of such liens. These liens by their express language attach from the time of their filing to all property thereafter acquired before the liens expire. The liens have not expired. What action could more clearly "release" and "affect" (by rendering totally ineffective) the board's tax liens, contrary to the clear and unlimited language of section 17 of the Bankruptcy Act.

If the language of section 17 be insufficiently clear, its legislative history removes all doubts.

When the proviso under consideration was added to the bill in August 1958, House of Representatives Report No. 2535, 85th Congress 2d Session, dated August 8, 1958, reported the amendment as follows:

"COMMITTEE AMENDMENT"

"Page 3, line 4, strike out 'Act;' and insert 'Act: *And provided further*, That a discharge in bankruptcy shall not release or affect any tax lien.'

"This amendment was added to assure the preservation of tax liens even where the underlying tax debt has been discharged."

Thus, it is clear that the authors of this language intended by it that the tax lien should remain viable and effective even when the taxes it secured were discharged. Here is clear recognition that the tax lien creates rights and obligations completely separate from and independent from underlying tax debt, and statement of the authors' intention that the tax lien was not to be affected in any way by discharge of the underlying taxes.

On August 5, 1965, the Senate Finance Committee held hearings. Senator Ervin, Chairman of the Senate Judiciary Committee testified that this bill:

> ". . . does not affect any tax lien that is filed and made a public record. If the Treasury Department files a tax lien and gives notice to the public that a man owes money to the Government, it does not affect the claim of the Federal Government at all. . . .
>
> ". . . it does provide, first, that a *discharge* in bankruptcy will relieve a debtor of all taxes becoming due more than 3 years before bankruptcy *unless* the Government has *reduced those taxes to a tax lien—that is, given a public notice of them;* . . .
>
> " . . .
>
> "This bill says the Federal Government can still come in and have priority, if it will file a tax lien; and the bill says this man owes it, just as we have to file chattel mortgages, real estate mortgages, and deeds of trust, to disclose to the world our claim. The Federal Government can come in and it *can file this tax lien before the debt gets to be more than 3 years old, and it remains in effect, as far*

as the law is concerned forever." (Emphasis added.) (Senate Hearings before the Committee on Finance on the Discharge of Taxes in Bankruptcy, 89th Cong., 1st Sess., pp. 18-20.)

Finally, when the bill was on the floor of the Senate the floor manager explained the intention both orally and in writing that recorded tax liens remain enforceable regardless of discharge in bankruptcy.

"[H.R. 3438] provides *where the Internal Revenue Service has filed a lien,* and thus given the general public which deals with the prospective bankrupt knowledge of the federal government's claim, that *those taxes—regardless of how long they antedate the bankruptcy—are still valid. Other tax claims* which originated prior to 3 years before bankruptcy and *which have not been reduced to a lien, are discharged* in bankruptcy. . . ." (Emphasis added.) Sen. Ervin, 112 Cong. Rec. 13172. (daily ed. June 21, 1966).

". . . [O]nly those [taxes] which are older than three years and have not been placed on public notice will be affected. It does not seem to be unfair to the Federal government to give it three years to file a tax lien." 112 Cong. Rec. 13181-13182 (daily ed. June 21, 1966).

"In order to promote the effective rehabilitation of the bankrupt, this bill provides that a discharge in bankruptcy will relieve a debtor of all taxes which became due more than three years before bankruptcy *unless the government has reduced these taxes to a tax lien.* . . . One point which we would like to make clear is that *this bill*

does not affect taxes, if the tax has been reduced to a tax lien and made a part of the public record. . . ." (Emphasis added.) 112 Cong. Rec. 13183. (daily ed. June 21, 1966).

"The Internal Revenue Service can protect itself from current debts, because *under the bill it need only file a tax lien.* How long the taxes have been owed does not make any difference. *The tax debt then remains in existence forever, and is not affected by a discharge in bankruptcy.*" (Emphasis added.) Sen. Ervin, 112 Cong. Rec. 13180. (daily ed. June 21, 1966).

"The bill does not provide for a complete discharge of all tax liability. The fact is, there are limitations as to what could be discharged. It is true that the basic proposition is that all tax liens within 3 years preceding bankruptcy cannot be discharged but beyond that, *any tax lien which is of record cannot be discharged.*" (Emphasis added.) Sen. Hruska (also member of the sponsoring Judiciary Committee) 112 Cong. Rec. 13182 (daily ed. June 21, 1966).

Immediately thereafter, this bill and a related bill were passed.

Thus, legislative history from addition of the proviso until it was enacted into law consistently showed that its purpose was to classify recorded tax liens separately from other tax obligations and prevent their discharge.

A further basic rule of statutory construction recognized by this court is that statutory language will be construed to have meaning—not to be superfluous.

Bird v. Unied States, 187 U.S. 118, 124 (1902); *United States v. Blasius,* 397 F. 2d 203, 207 (C.A. 2 1968) cert, dism. 393 U.S. 1008. The ruling of the Court of Appeals in this case renders the proviso completely meaningless.

Professor Marsh, whom the Court of Appeals cited, stated:

> "*[I]f it is said that the provision only means that the discharge does not affect any tax lien with respect to property owned by the bankrupt at the date of filing the petition, the proviso becomes meaningless* insofar as it relates to section 17a(1). A discharge operates only prospectively; it does not relieve any of the existing property of the bankrupt from liability to be taken to pay his obligations. The whole purpose of the bankruptcy proceeding is to take existing property and apply it to those obligations, while releasing after-acquired property if the bankrupt obtains a discharge. To say that a discharge does not release or affect a lien as it applies to existing property is a nonsensical statement. . . ." (Emphasis added.) Marsh, *Triumph or Tragedy?* The Bankruptcy Amendments of 1966, 42 Wash. L. Rev. 681, 711-12 (1967).

Collier on Bankruptcy, the leading secondary authority in the field of bankruptcy, in analyzing the proviso stated; "It seems to have been accepted that the notion of the bill is to provide non-dischargeable status to tax debts perfected by recording into tax liens. . . ."

Collier on Bankruptcy, Vol. 1 (14th ed.) pp. 1618-19 (1967).

Conclusion

Brevity is requested in Petitions for Certiorari, so no effort is made to include here all the complete answers to the arguments contained in the District Court's decision or made on behalf of the bankrupt. These are contained in the briefs heretofore filed.

It is hoped that this petition makes clear the nationwide importance—particularly to state and local government—of the federal question of discharge of recorded tax liens. This question deserves full consideration and careful analysis of, and an explanatory opinion on the statutory language, legislative intention, and public policies involved (which were not given by the lower courts). It is respectfully requested that the Supreme Court take jurisdiction.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Ninth Circuit

United States Court of Appeals for the Ninth Circuit.

In the Matter of Richard A. Carlson, *Bankrupt*, California State Board of Equalization, *Petitioner and Appellant*, vs. Richard A. Carlson, *Respondent and Appellee*. No. 23,580.

[February 9, 1970]

Appeal from the United States District Court for the Central District of California

Before: BROWNING, ELY, and CARTER, Circuit Judges

PER CURIAM:

The only substantial question presented is whether the proviso in section 17a(1) of the Bankruptcy Act, 11 U.S.C. § 35(a), preserves a pre-bankruptcy tax lien as to assets acquired after bankruptcy. The three district courts which have considered this question have answered it in the negative. *In re Carlson*, 292 F.Supp. 778 (C.D. Calif. 1968); *In re Braund*, 289 F.Supp. 604 (C.D. Calif. 1968); *United States v. Sanabria* (N.D. Ill., June 21, 1968) (Unreported) (Appeal pending in the Court of Appeals for the Seventh Circuit, No. 17,145). *See also* Marsh, Triumph or Tragedy? The Bankruptcy Amendments of 1966, 42 Wash. L. Rev. 681 (1967); Note, 14 Vill. L. Rev. 323, 326 (1969).

There are substantial arguments on both sides, but we have concluded that on balance the result reached in these decisions is the better one.

Affirmed.

APPENDIX B

Decision of the District Court

In the Matter of Richard A. Carlson, Bankrupt. No. 22588.

United States District Court
C. D. California.

Oct. 22, 1968.

Thomas C. Lynch, Atty. Gen. of California, Philip W. Marking and Neal J. Gobar, Deputy Attys. Gen. of California, by Neal J. Gobar, Los Angeles, Cal., of counsel, for appellant, Bd. of Equalization of the State of California.

Slate & Leoni, Los Angeles, Cal., by Andrew F. Leoni, Los Angeles, Cal., of counsel, for respondent, Richard A. Carlson.

DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER AFFIRMING ORDER OF REFEREE

HAUK, District Judge.

Respondent filed a Petition for Restraining Order before A. K. Phelps, Referee in Bankruptcy, seeking to restrain and enjoin the Board of Equalization of the State of California from levying on any after-acquired property of the Bankrupt. An Order to this effect was made by the said Referee.

The Appellant, the Board of Equalization of the State of California (hereinafter designated as "Board") filed a Petition for Review.

The jurisdiction of this Court is asserted pursuant to Section 39(c) of the Act of Congress Relating to Bankruptcy (11 U.S.C. § 67).

The facts, admitted and uncontested by both Appellant and Respondent, are set forth in the Referee's Certificate on Review, his Memorandum Opinion, and his Findings of Fact, Conclusions of Law and Order herein.

Richard A. Carlson, the hereinabove named Bankrupt, (hereinafter designated "Bankrupt") filed a Voluntary Petition in Bankruptcy on September 22, 1967. At the time of the filing, he was indebted to the Board under the Sales and Use Tax for a tax liability which arose more than three years prior to the filing of the instant Petition in Bankruptcy, and that liability was then secured by liens which had been recorded by the said Board.

Subsequent to the filing of the Petition in Bankruptcy, the Board levied on the salary of the bankrupt which had been earned after the filing of the Petition. A Restraining Order was sought from the Referee by the Bankrupt to release said funds, and, further, to enjoin and restrain said Board from levying on after-acquired property of the Bankrupt. An Order to this effect was made by the Referee.

Thereafter, the Board filed a Petition for Review from the Order of the said Referee and the specific question raised on review, which is conceded by both Appellant and Respondent to be the sole question, is the interpretation of the 1966 Amendment to Section 17 of the Bankruptcy Act, more particularly whether or not a taxing authority, in this case the Board, which on the date of a filing of a Petition in Bankruptcy has a valid recorded lien for unpaid tax liability, is precluded by the 1966 Amendment to Section 17 of the Bankruptcy Act from enforcing that lien against the property of the taxpayer which may be acquired by said taxpayer after the commencement of the bankruptcy proceeding.

The Court has examined the entire record, which includes among other things, the Referee's Certificate on Review, the Application of the Bankrupt to Restrain and Enjoin the Board from levying upon after-acquired property of the Bankrupt, The Response of the Board to said Application, the Findings of Fact and Conclusions of Law of the Referee and the Points and Authorities submitted by Appellant and Respondent. The matter has been extensively argued by counsel in writing. The Court has reviewed all of this material, and the Court being fully advised in the premises, renders its Decision in favor of the Bankrupt-taxpayer and against the Board of Equalization, affirming the Referee's Order discharging the tax liability and restraining the Board from levying on taxpayer's after-acquired property.[1]

DECISION

Section 17, sub. a(1) of the Bankruptcy Act (11 U.S.C. § 35) was amended, effective October 3, 1966, to provide as follows:

> "Section 17. Debts Not Affected by a Discharge.
> a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are taxes which became legally due and owing by the bankrupt to the United States or to any State or

[1]Our decision is in accord with the only cases directly bearing on this problem: In the Matter of Walter R. Braund and Virginia M. Braund, Bankruptcy Nos. 986-III and 987-III, decided in a memorandum order of August 29, 1967, by my brother Judge Irving Hill of the Central District of California; and United States v. Ulises A. Sanabria, No. 67-C-505, Northern District of Illinois, Eastern Division, an unreported case without memorandum opinion.

any subdivision thereof within three years preceding bankruptcy: Provided, however, That a discharge in bankruptcy shall not release a bankrupt from any taxes (a) which were not assessed in any case in which the bankrupt failed to make a return required by law, (b) which were assessed within one year preceding bankruptcy in any case in which the bankrupt failed to make a return required by law, (c) which were not reported on a return made by the bankrupt and which were not assessed prior to bankruptcy by reason of a prohibition on assesment pending the exhaustion of administrative or judicial remedies available to the bankrupt, (d) with respect to which the bankrupt made a false or fraudulent return, or wilfully attempted in any manner to evade or defeat, or (e) which the bankrupt has collected or withheld from others as required by the laws of the United States or any State or political subdivision thereof, but has not paid over; but a discharge shall not be a bar to any remedies available under applicable law to the United States or to any State or any subdivision thereof, against the exemption of the bankrupt allowed by law and duly set apart to him under this Act: And provided further, That a discharge in bankruptcy shall not release or affect any tax lien."

There is no question, and all parties to the controversy agree, that the tax in question became due and owing more than three years before the commencement of the bankruptcy proceeding and apparently, it would be admitted by the Appellant that the bankrupt would be entitled to a discharge of those particular tax claims, rely-

ing upon the last clause of the amended statute set forth above and in particular which states as follows: "A discharge in bankruptcy shall not release or affect any tax lien." The Bankrupt, on the other hand, takes the position that that tax lien is to apply only to property belonging to him as of the date of the filing of the Petition in Bankruptcy, and that the lien does not survive to encompass after-acquired property. The Bankrupt further argued that an interpretation as urged by the Board is contrary to the plain language of the amended statute; that it is in direct conflict with the legislative history of the amended statute; and that the interpretation of the Board, if adopted, would destroy the intent and purposes of the statute, as amended. As will be set forth hereinafter, the legislative history supporting this enactment emphatically supports the interpretation placed upon Section 17, sub. a(1) by the Bankrupt. However, this Court would find it unnecessary to even examine that legislative history (but it will do so) since the meaning of the statute, as amended, is plain and unambiguous. The Supreme Court of the United States has stated on numerous occasions that where the language of a statute is clear resorting to legislative history is unnecessary. Ex parte Collett, 337 U.S. 55, 69 S.Ct. 944, 959, 93 L.Ed. 1207 (1948). The language of the statute is the best and most reliable index of its meaning. Department and Specialty Store Empl. Union, etc. v. Brown, 284 F.2d 619 (9th Cir. 1960).

With this basic rule of construction in mind, the Court now looks at the language of Section 17, sub. a(1), as amended. Briefly, that Amendment provides that all taxes which were legally due and owing more than three years before bankruptcy are discharged by the bankruptcy proceedings.

The amended section set forth five exceptions to the general statement made above to the effect that a discharge in bankruptcy will not release the bankrupt in any taxes in situations where:

1. The Bankrupt failed to file a return.

2. Which was assessed within one year preceding bankruptcy and any case in which the Bankrupt failed to make a return as required by law.

3. He has made a false or fraudulent return.

4. Has been in the process of exhausting administrative or judicial remedies, and

5. Has failed to pay any withholding tax.

The statute then goes on to say that tax liens shall remain unaffected. It is clear that the statute does not say that tax claims which have been made the subject of tax liens shall remain unaffected or not discharged. If Congress had intended such a result the same could have been easily provided for in the statute but it did not do so. The meaning of the statute is plain: taxes (with the exceptions as noted above) over three years old are discharged whether a lien has been filed or not. However, the lien itself remains unaffected, that is, the Board has a lien upon the property of the bankrupt which was owned at the time of the filing of the Petition in Bankruptcy. Any other construction of the statute requires reading into words which do not appear on its face.

The main authority, the Board submits in support of its interpretation of Section 17, sub. a(1), were statements of Senator Ervin on the State floor as follows:

> "[H.R. 3438] provides where the Internal Revenue Service has filed a lien, and thus given

the general public which deals with the prospective bankrupt knowledge of the Federal Government's claim, that those *taxes*—regardless of how long they antedated the bankruptcy—are still valid. *Other tax claims* which originated prior to 3 years before bankruptcy and *which have not been reduced to a lien,* are discharged in bankruptcy * * *." [Emphasis added.] Cong.Rec. June 21, 1966, p. 13172.

"* * *

"One point which I would like to make clear is that *this bill does not affect taxes, if the tax has been reduced to a tax lien and made part of the public record.*" [Emphasis added.] Cong.Rec. June 21, 1966, p. 13182.

The first of these remarks was made as a part of Senator Ervin's lengthy and detailed opening statement upon initiating consideration of H.R. 3438 by the Senate. The second is from a prepared written statement presented by Senator Ervin on H.R. 3438.

It is the contention of the Board that Senator Ervin was taking the position that if a tax lien exists, the underlying tax claim cannot be discharged by choosing selectively from Senator Ervin's statements on the Senate floor. However, a thorough examination of that Senate debate makes it clear that such was not Senator Ervin's position.

Senator Ervin began the debate by reading into the Congressional Record certain portions of the report of the Committee on the Judiciary. The key portion which he read provided as follows:

"While under this bill, unsecured tax claims due and owing more than 3 years prior to bankruptcy

would be dischargeable, there is no intention to place any time limit on otherwise valid tax liens. As with other secured claims like mortgages and conditional sales contracts, the purpose of the lien is to give the creditor a property interest which is indefeasible in bankruptcy. *Thus, to the extent that the tax authorities may satisfy their claims out of the security they hold they will be unaffected by the discharge* regardless of the fact that the underlying debt may include taxes for years prior to the 3-year period preceding bankruptcy. The second proviso to section 17a(1) proposed by section 2 of this bill emphasizes this legislative intent." (Emphasis added)

What Senator Ervin was saying was that to the extent the Board has a valid tax lien, that lien remains unimpaired.

This treatment accorded the Board is no different from the treatment of a lien holder who holds, for example, a security interest in the Bankrupt's automobile. Such a secured creditor has the right to sell the automobile to satisfy his lien. However, if the proceeds of that sale are not sufficient to pay the secured creditor in full, the balance of his claim is that of a general, unsecured creditor and it is discharged by virtue of the bankrupt's discharge.

Both the House and the Senate Committee Reports make it crystal clear that this is the treatment intended for tax claims where liens have been filed. These reports make three points. They first point out that over the past 28 years, taxes have come to represent an increasingly large portion of the average bankrupt's debts. In many cases, taxes are the largest single debt. For

this reason, the nondischargeability of taxes has served to prevent the Bankruptcy Act from performing its main purpose, which is the financial rehabilitation of the bankrupt. Secondly, these Committee Reports point out there was unfair discrimination against the private individual and the unincorporated small businessman going through bankruptcy. The corporate bankrupt ceases operation after bankruptcy, although the enterprise often continues in a different form. The practical effect was to leave tax claims against corporate bankrupts unsatisfied. The individual and unincorporated small businessman was afforded no such advantage. The final point made by the Committee was that although tax liens are left unaffected under the proposed legislation, the lien applies only to assets existing as of the date of bankruptcy. The underlying tax claim is fully discharged. The following quotations from Senate Report No. 1158, 89th Cong. 1st Sess. 2, 3 (1966) fully support the statements above:

> "Under existing law debts for taxes are not affected by a discharge in bankruptcy (sec. 17a(1) of the Bankruptcy Act, 11 U.S.C. 35(a) (1)). Similarly, taxes are entitled to a priority of payment, in advance of the payment of any dividend to general creditors, which is unlimited as to time (sec. 64a(4), 11 U.S.C. 104(a) (4)). This applies to all taxes whether due to Federal, State or local governments. Although taxes have enjoyed this special status for many years, the enormous increase in the tax burden during recent years and the consequent impact on both the distribution of a bankrupt's estate and his financial rehabilitation, require a modification of that status.

"There are two aspects to the problem. The first of these involves the nondischargeability of taxes under section 17a(1) of the present law. Frequently, this prevents an honest but financially unfortunate debtor from making a fresh start unburdened by what may be an overwhelming liability for accumulated taxes. The large proportion of individual and commercial income now consumed by various taxes makes the problem especially acute. Furthermore, the nondischargeability feature of the law operates in a manner which is unfairly discriminatory against the private individual or the unincorporated small businessman. Although a corporate bankrupt is theoretically not discharged, the corporation normally ceases to exist upon bankruptcy and unsatisfied tax claims, as well as all other unsatisfied claims, are without further recourse even though the enterprise may continue in a new corporate form * * *

"While, under this bill, unsecured tax claims due and owing more than 3 years prior to bankruptcy would be dischargeable, there is no intention to place any time limit on otherwise valid tax liens. *As with other secured claims like mortgages and conditional sales contracts, the purpose of the lien is to give the creditor a property interest which is indefeasible in bankruptcy. Thus, to the extent that the tax authorities may satisfy their claim out of the security they hold they will be unaffected by the discharge regardless of the fact that the underlying debt may include taxes for years prior to the 3-year period preceding bankruptcy.* The second proviso to section 17a (1) proposed by sec-

tion 2 of this bill emphasizes this legislative intent. There is no intention to alter the relative position in the distribution of the bankrupt's assets which is now given to a tax lien on personalty unaccompanied by possession by the postponement provision in section 67c." (Emphasis added)

These two Committee Reports accurately set forth the true intent of the Congress. In the course of oral argument on the Senate Floor, the choice of words by a Senator is not always accurate or exact. For this reason, courts have held that statements in debate are not a proper measure of the contents of a statute. Gan Seow Tung v. Carusi, 83 F.Supp.480 (S.D.Cal. 1949). While such statements in debate may be considered, they are held to be a highly doubtful aid in statutory construction. Goodyear Tire and Rubber Company v. F. T. C., 101 F.2d 620 (6 Cir.), cert. denied 308 U.S. 557, 60 S.Ct. 74, 84 L.Ed. 468 (1939).

Reliance upon statements made by Senator Ervin during debate should not be permitted to derogate from the true legislative intent The Supreme Court has cautioned the courts that Senate debate is not entitled to carry the same weight as carefully considered Committee Reports. United States v. International Union of United Auto, Aircraft and Agr. Implement Workers of America, 352 U.S. 567, 77 S.Ct. 529, 1 L.Ed.2d 563 (1947).

There is a recognized judicial maxim that statutes must be construed to carry out their legislative purpose. Owensboro Wagon Co. v. C. I. R., 209 F.2d 617 (6th Cir. 1954). The quotations above, from the Committee Reports make it plain that the purpose of the Congress, in amending Section 17, sub. a (1),

was to enhance the individual's opportunity to financially rehabilitate himself in bankruptcy, by eliminating his old tax debts. Unfortunately, if the Board's view is accepted, that purpose can and will be entirely frustrated, for if the filing of a tax lien prevents the discharge of tax debts over three years old, the Board will always automatically file tax liens within three years of the due date.

The courts have cautioned that the Congress' purpose in enacting legislation and the evil to be remedied thereby are paramount in determining the proper construction. In re Park Distributors, Inc., 176 F.Supp. 38 (S.D.Cal. 1959). Special attention must be given to the evils which the statute is designed to overcome and the statute should be interpreted so as to effectuate rather than destroy it. United States v. Yee Ngee How, 105 F.Supp. 517 (N.D.Cal. 1952). Section 17, sub. a(1) can only serve its intended purpose by correctly construing it to mean claims over three years old are discharged, even though tax liens on existing property remain unaffected.

Another universally accepted maxim of judicial construction is that statutes which are intended to be remedial in nature should be liberally construed. Sablowsky v. United States, 101 F.2d 183 (3rd Cir. 1938). Congress has made it clear that its intention in amending Section 17, sub. a(1) was to remedy an existing injustice: the nondischargeability of tax claims in bankruptcy. This Court should not aid the government in its efforts to impose an unwarranted limitation upon that remedy.

On the other hand, it is a cardinal rule of judicial construction that exceptions must be strictly construed.

Midland Cooperative Wholesale v. Ickes, 125 F.2d 618 (8th Cir.), cert. denied, 316 U.S. 673, 62 S.Ct. 1045, 86 L.Ed. 1748 (1942). This is particularly true where the exception relates to a statute which is remedial in purpose. Korherr v. Bumb, 262 F.2d 157 (9th Cir. 1959). For this additional reason, the exception preserving tax *liens* should not be magnified into an exception preserving tax *claims*.

It should be pointed out that the Board, in taking the position it has in this matter, is attempting to convince this Court to accept arguments which were rejected by the Congress in passing this remedial legislation. Professor Frank Kennedy of the University of Michigan, a member of the National Bankruptcy Conference, and one of the key proponents of this legislation, predicted that the government would make another effort to destroy the amendment to Section 17, sub. a(1) at the judicial level. In an article entitled, "The Bankruptcy Amendments of 1966" (which appeared in 1 Georgia Law Review 149 and in serial form in the January and April, 1967, Journal of the National Conference of Referees in Bankruptcy) stated at pages 178 and 179 of the Georgia Law Review article:

> "The second proviso of section 17a (1) states simply 'That a discharge in bankruptcy shall not release or affect any tax lien.' Counsel for both the Treasury and Justice Departments seem to have been completely mystified by the last two clauses of the amendment of section 17a(1).[120] The notion that a claim should be discharged and yet be enforceable against exempt property or to the extent secured by a lien against pre-

existing property transcended their conception of a discharge as either an absolute bar or utter nullity. The objection of the Government that the clauses created 'an internal inconsistency' which would raise 'many grave problems'[121] could not be taken seriously, however, by anyone who has examined the nature and operation of a discharge in bankruptcy.[122]

"It has been reported that the Government now intends to rely on the second proviso as a basis for enforcing discharged tax claims against after-acquired property whenever notice of assessment has been filed before bankruptcy. Whether a tax lien is perfected by notice filing is an irrelevancy insofar as its enforceability against the tax debtor is concerned, but if all federal taxes assessed before bankruptcy survive discharge, section 17a(1) saving only certain taxes if assessed within a year before a bankruptcy makes no sense at all. As the discussion of the second proviso in the legislative report indicates,[123] its purpose is to accord the same post-discharge treatment to tax liens as that accorded to mortgages and other consensual security interests. The discharge of tax claims over three years old will not affect their enforceability against valid security held at bankruptcy. The clear implication of the discussion is that after such security is exhausted, no deficiency may be asserted against any after-acquired property.

"The role of a discharge in withdrawing any basis 'for the creation of an enforceable lien upon a subject not existent when the bankruptcy became effective' was established in the classic case of Lo-

cal Loan Co. v. Hunt.[124] That case also established the extraordinary jurisdiction of the bankruptcy court to enjoin state court litigation which threatened to frustrate the benefits of the decree of discharge, and which would have gone against the bankrupt unless and until he had carried his case from the municipal court through the intermediate court of appeal and supreme court of the state to the Supreme Court of the United States.[125] If the Government does take the position that the filing of a notice of assessment before bankruptcy immunizes a federal tax claim from discharge as against post bankruptcy acquisitions, a case falling more clearly within the scope of both aspects of Local Loan Co. v. Hunt would be difficult to imagine.[126] The summary remedies available to the Government, the smallness of the stake, the unequal position of the taxpayer and the Government in litigating the merits of the controversy, and the notorious unwillingness of the Service to abide by adverse rulings by lower courts all argue for exercise by the bankruptcy court of its power to vindicate its decree particularly when and if the Government seeks to enforce a discharged tax liability against post bankruptcy earnings." (Footnotes omitted.)

It is incumbent upon this Court to reject the contentions of the Treasury Department and effectuate the remedial purpose intended for this legislation by Congress, by discharging the tax claims in question.

The Board in its Argument further points out that Congress had recognized a policy that certain obligations be paid after bankruptcy which, in essence, have re-

sulted in their not being dischargeable under Section 17 of the Bankruptcy Act. But, as pointed out by the Board in its Memorandum, the discussions as well as the reports clearly show that there is a compromise being sought between the necessity of the taxes being paid and the desire to allow a fresh start.

The Board contends that the discussions on the floor of the Senate show the basic objections of the sponsor and the Judiciary Committee was the secret Federal lien and its adverse effect on the taxpayer and other creditors. They point out that most State taxes, including those here involved, can obtain lien rights only by recording a lien and, further, that the secret Federal lien has priority over the recorded State lien. The Board then goes on to state that there would be a disastrous effect if the Bankrupt's interpretation of Section 17 were followed. However, again, what the Board is attempting to do is attempting to read into the Act, or have read into the Act, that there should be exceptions, but unfortunately Section 17, as amended, makes reference only to taxes owing to the United States and the section reads in pertinent part as follows:

> "* * * are taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof within three years preceding bankruptcy."

It is thus plain from the very language of the section itself that Congress was not talking, or not considering, only Federal liens or Federal taxes, but were concerned with, and did deal with, taxes owed to any taxing authority.

In accordance with the foregoing, which also shall constitute Findings of Fact and Conclusions of Law, the Court now makes its formal Findings of Fact, Conclusions of Law and Order thereon.

FINDINGS OF FACT

1. That on the 22nd day of September, 1967, Richard A. Carlson, the hereinabove named Bankrupt, filed a Voluntary Petition in Bankruptcy in the United States District Court for the Central District of California, and the said matter was referred to A. K. Phelps, Referee in Bankruptcy, for the purposes of administration.

2. That on the 22nd day of September, 1967, the date of the filing of the said Voluntary Petition, the Bankrupt, Richard A. Carlson, was indebted to the Board of Equalization of the State of California in the amount of $14,609.13 under the Sales and Use Tax law of the State of California. That said liability arose more than three years prior to September 22, 1967, and said liability on September 22, 1967, was secured by liens recorded in the Office of the County Recorder of Orange and Los Angeles, which tax liens, but for the effect of the Bankruptcy Act would remain in full force and effect.

3. That although Richard A. Carlson, the Bankrupt, held assets on September 22, 1967, such assets were insufficient to pay the aforesaid tax liability in full and, accordingly, it would be necessary for the said State Board of Equalization in ordinary circumstances to look

to assets acquired after September 22, 1967, in order to collect the liability as set forth hereinabove, but for the intervention of the said bankruptcy filed as set forth above.

The following Conclusions of Law insofar as they may be considered Findings of Fact are also found by the Court to be true in all respects. From the foregoing facts, the Court concludes that:

CONCLUSIONS OF LAW

I

That the aforesaid tax liability of Richard A. Carlson, the Bankrupt hereinabove named, owing under the Sales and Use Tax of the State of California is a debt which is dischargeable under the provisions of Section 17 of the Act of Congress Relating to Bankruptcy.

II

Any Conclusions of Law contained in the Findings of Fact are deemed incorporated herein by reference.

ORDER

By reason of the foregoing Decision, Findings of Fact and Conclusions of Law, it is hereby ordered that the aforesaid tax liability of Richard A. Carlson under the Sales and Use Tax of the State of California is dischargeable under the provisions of Section 17 of the Act of Congress Relating to Bankruptcy.

It is further ordered that the Bankrupt having received his discharge in bankruptcy, the State Board of

Equalization, its agents, servants and employees and any person seeking to act for and on behalf of the State Board of Equalization be, and each of them are, hereby permanently restrained and enjoined from taking any action to collect said tax.

It is further ordered that the Order of A. K. Phelps, Referee in Bankruptcy, which found that the said tax liability is dischargeable under the provisions of Section 17 of the Act of Congress Relating to Bankruptcy, and the said Order which restrained and enjoined the State Board of Equalization, its agents, servants and employees, and any person seeking to act for and on behalf of the State Board of Equalization as being permanently restrained and enjoined from collecting said tax be, and the same is hereby reaffirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 150

CALIFORNIA STATE BOARD OF EQUALIZATION,
Petitioner,

v.

RICHARD A. CARLSON,
Respondent.

BRIEF OF AMICI CURIÆ IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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LEDGER PRESS, INC., HARTFORD

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted] 1549

CALIFORNIA STATE BOARD OF EQUALIZATION,
Petitioner,

v.

RICHARD A. CARLSON,
Respondent.

BRIEF OF AMICI CURIÆ IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

INTEREST OF AMICI CURIÆ

This Petition for a Writ of Certiorari is a case of first impression involving the interpretation of § 17a(1) of the Bankruptcy Act (11 U.S.C. § 35(a)). The courts below have held that a lien for state taxes does not survive a discharge in bankruptcy and so cannot attach to after-acquired property. The statute, to the contrary, provides that a discharge in bankruptcy shall not release or affect any tax lien.

This brief of amici curiae is filed pursuant to Rule 42(4) of the Rules of the Supreme Court and is presented for the State of Connecticut, sponsored by its Attorney General, and for the other undersigned states, sponsored by their Attorneys

General, as shown below, and in which brief all have joined together and appear as amici of the Court. All the undersigned states, and the political subdivisions thereof, have provisions pertaining to the enforcement of tax obligations by means of liens which are integral components of their fundamental jurisdiction to impose taxes.

Our purpose in filing this amici brief is to directly support the State of California in its contention that taxes secured by recorded liens are not dischargeable in bankruptcy and to represent to the Court that not only the undersigned states, but also all taxing jurisdictions have a vital interest in a final determination of the intent of Congress when it amended § 17a(1) of the Bankruptcy Act (11 U.S.C. § 35(a)), effective October 3, 1966, since the revenues of the several states will be affected thereby.

ARGUMENT

For its argument, the State of Connecticut, joined by the undersigned states, concurs in the reasons advanced by the State of California in its Petition and hereby adopts said argument as its own.

CONCLUSION

An important question of federal law has been decided by the United States Court of Appeals for the Ninth Circuit which has not been, but should be, settled by this Court. Accordingly, we submit that the question presented in the petition for a writ of certiorari is of such substance and of such broad national interest that it warrants plenary consideration by this Court.

Respectfully submitted,

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PROOF OF SERVICE

I, Ralph G. Murphy, one of the attorneys for Robert K. Killian, Attorney General of Connecticut, as one of the amici curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of May, 1970, I served copies of the foregoing "Amici Curiae Brief in Support of Petition for a Writ of Certiorari of Petitioner" on the several parties thereto, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to each of the following attorneys of record in this cause:

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1969

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CALIFORNIA STATE BOARD OF EQUALIZATION,

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RICHARD A. CARLSON,

Respondent.

RESPONDENTS' ANSWERING BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1548

CALIFORNIA STATE BOARD OF EQUALIZATION,

Petitioner,

vs.

RICHARD A. CARLSON,

Respondent.

RESPONDENTS' ANSWERING BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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In The

SUPREME COURT OF THE UNITED STATES

October Term 1969
No. 1548

CALIFORNIA STATE BOARD OF EQUALIZATION,

Petitioner,

vs.

RICHARD A. CARLSON,

Respondent.

RESPONDENT'S ANSWERING BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

OPINION BELOW, JURISDICTION, AND STATEMENT OF THE CASE

Counsel for petitioner has fairly set forth the opinions below, the jurisdiction of the Court as invoked, the statements involved and a statement of facts in the case.

REASONS FOR DENYING THE WRIT

However, it is respectfully submitted that certiorari should not be granted in this case. As was pointed out in the matters of WALTER R. BRAUND and VIRGINIA M.

BRAUND, bankrupts; UNITED STATES OF AMERICA, Appellan vs. WILLIAM A. McGUGIN, Appellee, 423 F. 2d 718:

"It is crystal clear that one of the principal purposes of the 1966 amendment was to aid in the rehabilitation of bankrupts by relieving them of certain older tax liability. The House Judiciary Committee, in its favorable report on House Bill, H.R. 3438 (H.R. Rep. No. 687, 89th Cong. 1st Sess. 1965) which favorable report was also quoted by the Senate Judiciary Committee on its recommendation of the bill, (S. Rep. No. 1158, 89th Cong., 2nd Sess. 1966; U.S. Code Cong. Adm. News 2468 (1955)), discuss the previous non-dischargeability of tax liability. It goes on to say:

> 'Frequently this prevents an honest but financially unfortunate debtor from making a fresh start unburdened by what may be an overwhelming liability for accumulated taxes * * * Furthermore, the non-dischargeability feature of the law operates in a manner which is unfairly discriminitory against the private

individual or the unincorporated small businessman. Although a corporate bankrupt is theoretically not discharged, the corporation normally ceases to exist upon bankruptcy and unsatisfied tax claims, as well as all other unsatisfied claims, are without further recourse even though the enterprise may continue in a new corporate form. (Emphasis Added)

U.S. Code Cong. Adm. News 2469 (1966).'"

Further reading in the same case, we find the following:

" . . . . In other words, Congress was saying that to the extent the lien had, before the bankruptcy, attached to property a later discharge in bankruptcy did not affect the right of the government to proceed against that property under the lien. To that extent, but to that extent only, the discharge would not 'release or affect' the tax lien. But if the tax liability is not paid in full by the proceeds of such property, the remainder of the tax liability is 'released' and no afteracquired property can be subjected to any lien because the lien died with the

release of the underlying obligation.

Support for this construction is found in the same House Judiciary Committee report cited above:

> 'While, under this bill, unsecured tax claims due and owing more than 3 years prior to bankruptcy would be dischargeable, there is no intention to place any time limit on otherwise valid tax liens. As with other secured claims like mortgages and conditional sales contracts, the purpose of the lien is to give the creditor a property interest which is indefeasible in bankruptcy. Thus to the extent that the tax authorities may satisfy their claims out of the security they hold they will be unaffected by the discharge regardless of the fact that the underlying debt may include taxes for years prior to the 3-year period preceding bankruptcy. The second proviso to section 17a(1) proposed by section 2 of this bill emphasizes this legislative intent * * * (Emphasis

added) Id. at 2470.'

Note the concern that the property interest of the government obtained pursuant to the lien up to the time of the filing of the bankruptcy should be 'indefeasible' in the bankruptcy. Note also the assurance that the right of the tax authorities to realize on the 'security they hold' as of the time of the bankruptcy should be 'unaffected by the discharge'.

I construe the section in question as above indicated. The same construction has been given to it by Professor Frank R. Kennedy, a member of the National Bankruptcy Conference. See Kennedy, op. cit., supra at 179." *

Since the decision in the instant case, as well as in the matter of BRAUND, supra, the 7th Circuit has likewise spoken on the same subject. In the Matter of UNITED STATES OF AMERICA vs. SANABRIA, ET AL., (U.S. Court of Appeals, 7th Circ. No. 17145, April 28, 1970. Appeal from the United States District Court, Northern District

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* It is only fair, however, to point out that a petition for Writ of Certiorari has been filed by the Solicitor General of the United States in respect to the Matter of Braund.

of Illinois, Eastern Division. That case is set forth in full in the Appendix.

As was pointed out in the instant case, there are substantial arguments on both sides. But the Circuit thought on balance the results reached in this decision was the better one.

In the matter of SANABRIA, supra, the Court states as follows:

> "The legislative history is more fully described in those decisions. At the very best for the government, portions of the history are ambiguous. Several statements of Senators, relied on by the government, which might possibly be construed to support the government position, never really make it clear that the speaker was addressing himself to an effect of the federal lien on property acquired after bankruptcy, or asserting more than that a lien, recorded before bankruptcy, would retain its full effect upon property interests which became subject to it before bankruptcy."

CONCLUSION

It is respectfully submitted, that the petition for Writ of Certiorari in the above entitled matter should be denied.

Respectfully submitted,

SLATE AND LEONI

By _____
Attorneys for Respondent

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[§63,506] UNITED STATES OF AMERICA v. SANABRIA, ET AL.

United States Court of Appeals, Seventh Circuit. No. 17145. April 28, 1970. Appeal from United States District Court, Northern District of Illinois, Eastern Division.

TAXES--EFFECTIVENESS OF LIEN--PROPERTY ACQUIRED AFTER DISCHARGE

The government was not entitled to a lien for unpaid income taxes on property acquired by the discharged debtor after his bankruptcy since the 1966 amendment to section 17(a) of the Bankruptcy Act precludes the enforcement of liens for unpaid taxes which were legally due and owing more than three years prior to bankruptcy. The appellate court rejected the government's interpretation of the applicable statute (26 U.S.C. §6321) regarding the vitality of the lien since the dominant purpose of the change was to relieve a debtor of the burden of the older taxes after bankruptcy. See Sec. 17(a) at §4142.

Before Duffy, Senior Circuit Judge, FAIRCHILD, Circuit Judge, and BEAMER, District Judge.[1]

[OPINION IN FULL TEXT]

FAIRCHILD, Circuit Judge: The question on this appeal is whether a discharge in bankruptcy after the 1966 amendment to section 17(a) of the bankruptcy act prevents the lien for unpaid federal income taxes which became legally due and owing more than three years preceding bankruptcy from attaching to property acquired by the discharged debtor after bankruptcy.

[FACTS]

The government brought action against three defendants named Sanabria to recover unpaid income taxes. Two defendants averred discharges in bankruptcy, releasing them from liability for those taxes which had become legally due and owing more than three years before bankruptcy.

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[1] District Judge Beamer is sitting by designation from the Northern District of Indiana.

The government replied that liens arising on account of those taxes had been appropriately filed with the local recorder of deeds before the bankruptcy proceedings.

The district court granted judgment in favor of defendants with respect to the taxes allegedly discharged, and the government appealed.

[GOVERNMENT'S CLAIM]

The position of the government appears to be that although the taxes involved on this appeal are of sufficient age to be discharged as debts, the liens which arose and notices of which were filed retain sufficient vitality so that if the bankrupt defendants acquire property in the future it will be subject to those liens.

The bankruptcy proceedings were begun about the same time as the government brought its action to recover the taxes. Presumably the government now seeks a declaration that its liens arising out of the taxes outstanding more than three years retain such vitality, notwithstanding the discharge.

Under section 17(a) of the bankruptcy act,[2] prior to amendment in 1966, a discharge in bankruptcy did not release a bankrupt from a debt "due as a tax levied by the United States, or any state, county, district, or municipality." Clause (1) so described one of the types of provable debt not affected by a discharge.

Public Law 89-496[3] was enacted July 5, 1966, effective 90 days later. It amended clause (1) of section 17(a) so as to limit the class of taxes not dischargeable to "taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof within three years preceding bankruptcy" and to taxes under other specified sets of circumstances usually involving some failure to act or fault with respect to the tax liability on the part of the bankrupt. As a result of this restriction of clause (1), federal, state, and local taxes not described in clause (1) have been made dischargeable in bankruptcy.

At the end of clause (1) is a proviso which is the focal point of this controversy: "And provided further, That a discharge in bankruptcy shall not release or affect

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[2] 11 U.S.C. §35(a).
[3] 80 Stat. 270

any tax lien." The proviso means at least that a taxing authority's lien upon property already subjected to the lien at the time of bankruptcy is not released or affected by the discharge even where the tax which gave rise to the lien became legally due and owing more than three years before bankruptcy.

[GOVERNMENT'S CONTENTION]

The government contends that the proviso means something more, so that it will have a drastic impact upon the debtor during the period following bankruptcy.

The lien for unpaid federal income tax has a quality by which property acquired by a delinquent taxpayer after his tax liability arises and at any time during the life of the lien becomes subject to the lien.[4] The lien imposed by 26 U.S.C. §6321 continues until the liability is satisfied or becomes unenforceable by reason of lapse of time.[5]

The government would read the proviso as preserving this quality, where the lien had been filed before bankruptcy, into the period after bankruptcy, so that such lien would attach to property acquired by the debtor after bankruptcy.

[PURPOSE OF SECTION 17(a)]

But a fair reading of section 17(a), as amended, shows, in our opinion, that the dominant purpose of the change was to relieve a debtor of the burden of these older taxes after bankruptcy. The government's interpretation would permit it to enforce (to the extent of assets acquired by the discharged debtor) collection of all its taxes, regardless of their age, if a lien had been filed. This would to so substantial a degree frustrate the real purpose of the amendment that Congress surely must not have intended the result.

In considering a situation, which, though different, suggests some of the same considerations, the Supreme Court said:

"An adjudication of bankruptcy, followed by a discharge, releases a debtor from all previously incurred debts, with certain exceptions not pertinent here; and it

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[4] Glass City Bank v. United States (1945), 326 U.S. 265, 268, 66 SCt. 108, 90 LEd. 56, 59.
[5] 26 U.S.C. §6322.

logically cannot be supposed that the act nevertheless intended to keep such debts alive for the purpose of permitting the creation of an enforceable lien upon a subject not existent when the bankruptcy became effective or even arising from, or connected with, pre-existing property but brought into being solely as the fruit of the subsequent labor of the bankrupt."[6]

The Court went on to say that one of the primary purposes of the bankruptcy act, to permit the honest debtor to start afresh, "has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clean field for future effort, unhampered by the pressure and discouragement of pre-existing debt."[7]

[COMMITTEE REPORT]

The expressions just quoted were echoed in a committee report on the bill which provided for the amendment to section 17(a):

"Although taxes have enjoyed this special status for many years, the enormous increase in the tax burden during recent years and the consequent impact on both the distribution of a bankrupt's estate and his financial rehabilitation, require a modification of that status.

"There are two aspects to the problem. The first of these involves the nondischargeability of taxes under section 17a(1) of the present law. Frequently, this prevents an honest but financially unfortunate debtor from making a fresh start unburdened by what may be an overwhelming liability for accumulated taxes. The large proportion of individual and commercial income now consumed by various taxes makes the problem especially acute. Furthermore, the nondischargeability feature of the law operates against the private individual or the unincorporated small businessman. Although a corporate bankrupt is theoretically not discharged, the corporation normally ceases to exist upon bankruptcy and unsatisfied tax claims, as well as all other unsatisfied claims, are without further recourse even though the enterprise may continue in a new corporate form."[8]

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[6] Local Loan Co. v. Hunt (1934), 292 U.S. 234, 243, 54 SCt. 695, 78 LEd. 1230, 1235.

[7] Ibid.

[8] S.Rep.No. 1158, 89th Cong., 2d Sess. (1966), 2468, 2469.

Several district courts have decided that liens which arose from taxes which are discharged in bankruptcy under amended section 17(a) remain effective only upon assets existing as of the date of bankruptcy.[9]

The legislative history is more fully described in those decisions. At the very best for the government, portions of the history are ambiguous. Several statements of Senators, relied on by the government, which might possibly be construed to support the government position, never really make it clear that the speaker was addressing himself to an effect of the federal lien on property acquired after bankruptcy, or asserting more than that a lien, recorded before bankruptcy, would retain its full effect upon property interests which became subject to it before bankruptcy.

The judgment is affirmed.

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[9] In re Carlson (C.D.Cal., 1968), 292 FSupp. 778, 782; In re Joseph Luks, Bankrupt (N.D.Ohio, 1968) 68-2 USTC §9549; In re Braund (C.D.Cal., 1968), 289 FSupp. 604. See Kennedy, The Bankruptcy Amendments of 1966, 1 Ga. L.Rev. 149, 179, and fn. 122 (1967).